

STATE OF MICHIGAN
COURT OF APPEALS

LORI KIDDER, f/k/a LORI STEEB, Personal
Representative of the Estate of SHELDON
STEEB,

UNPUBLISHED
January 23, 2007

Plaintiff-Appellee,

v

PHILIP C. PTACIN, M.D., and DAYONE
FAMILY HEALTHCARE, PC,

No. 257703
Calhoun Circuit Court
LC No. 02-004548-NH

Defendants-Appellants.

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's order denying their motion for summary disposition in this medical malpractice case. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We note that we withheld issuance of this opinion pending two conflict resolution panels, both of which adjudicated this matter contrary to the initial findings of the trial court. We are therefore bound to reverse and remand for entry of summary disposition for defendants.

Decedent (DOB 5-3-00) died on May 16, 2000 after receiving treatment from defendants. Plaintiff, decedent's mother, was appointed personal representative of decedent's estate, and letters of authority were issued to her on September 21, 2000.¹ On May 3, 2002, plaintiff filed a notice of intent (NOI) to file a medical malpractice action, as required by MCL 600.2912d.

¹ The limitations period for a medical malpractice action is two years. MCL 600.5805(6). MCL 600.5852, a savings provision applicable to wrongful death actions, provides that if a person dies prior to the expiration of the limitations period, as happened in this case, the personal representative may commence an action within two years after letters of authority are issued. An action cannot be maintained unless it is filed within three years after the limitations period has expired.

During the time period relevant to this case, the filing of a NOI tolled the statute of limitations for 182 days.² Plaintiff filed suit alleging medical malpractice on November 19, 2002.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's complaint was barred by the statute of limitations because it was filed more than two years after the date of the alleged malpractice, and no savings provision applied. Defendants relied on *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), in which the Supreme Court held that the tolling period provided for in MCL 600.5856(d) did not apply to the savings provision in MCL 600.5852. The trial court denied the motion, concluding that *Waltz, supra*, did not apply retroactively to bar plaintiff's action. Subsequently, the trial court entered an order staying proceedings pending defendants' appeal of the order denying summary disposition. Since the entry of the trial court's order, this Court has held that the holding in *Waltz, supra*, applies retroactively. *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006).

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

We must reverse the trial court's order denying defendants' motion for summary disposition, and remand this case for entry of summary disposition on behalf of defendants because *Waltz, supra*, must be applied retroactively. This Court affirmed the retroactive application of *Waltz, supra*, in a special panel decision released in *Mullins, supra*. See also *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 568; 703 NW2d 115 (2005); *Ousley v McLaren*, 264 Mich App 486, 490-493; 691 NW2d 817 (2004). Plaintiff's act of filing a NOI on May 3, 2002, did not toll the two-year grace period provided for in MCL 600.5852. *Waltz, supra* at 650.

Decedent died on May 16, 2000; thus, the cause of action accrued on that date. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997). Plaintiff's letters of authority were issued on September 21, 2000. Plaintiff did not file suit on or before either May 16, 2002, the date the two-year statute of limitations applicable to medical malpractice actions expired, or September 21, 2002, the date the two-year saving provision expired. In light of *Waltz, supra*, *Ousley, supra*, and this Court's conflict resolution decision in *Mullins, supra*, plaintiff's suit was not filed in a timely manner, notwithstanding the fact that it was filed within three years after the expiration of the two-year statute of limitations applicable to medical malpractice actions.

Furthermore, plaintiff's argument that equitable tolling should operate to save her action and avoid a harsh and unjust result is also without merit given this Court's decision in *Ward v Siano*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 265599, rel'd November 14, 2006) (conflict panel holding that judicial tolling should not operate to relieve wrongful death

² 2004 PA 87, effective April 1, 2004, rewrote MCL 600.5856. The amended version of the statute does not apply in this case.

plaintiff's from complying with the time constraints imposed by *Waltz*). Accordingly, defendants are entitled to summary disposition.

Reversed and remanded for entry of summary disposition for defendants. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald